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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 1215

LEONARD EAST and ALVIN G. EAST, doing business as L. EAST PRODUCE COMPANY,
Petitioners

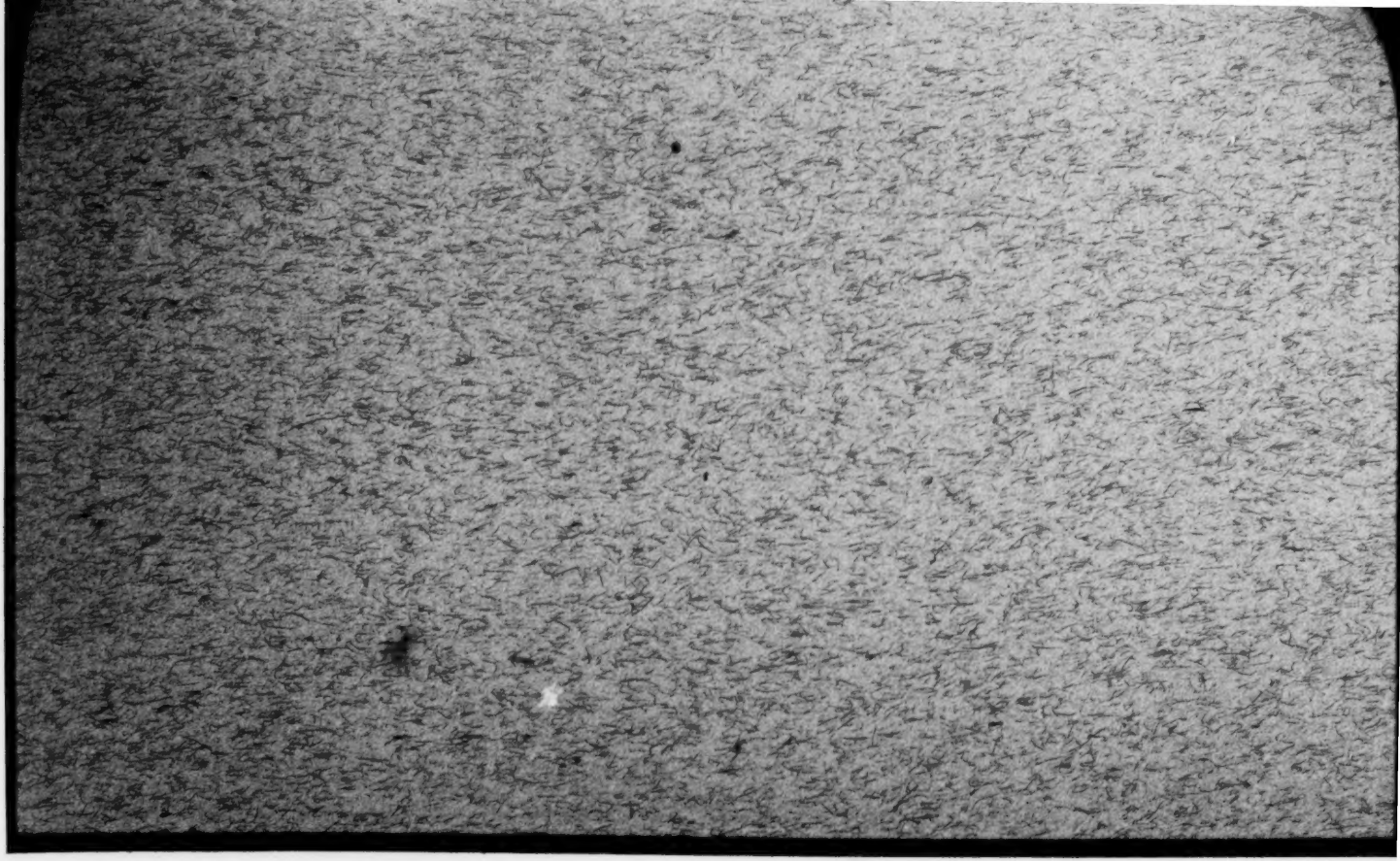
Versus

PAUL A. PORTER, ADMINISTRATOR, Office of Price Administration,
Respondent

BRIEF FOR PETITIONERS

SUPPORTING
PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES CIRCUIT COURT OF
APPEALS, FIFTH CIRCUIT

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TO THE SUPREME COURT OF THE UNITED STATES:

Leonard East and Alvin G. East doing business as L. East Produce Company, respectfully submit herewith their Brief in support of their petition that a Writ of Certiorari issue to review the final judgment of the United States Circuit Court of Ap-

peals, Fifth Circuit, affirming the judgment of the United States District Court, Western District of Texas, Austin Division, entered in this cause.

Opinions Below

No opinion was written by the United States District Judge.

The *per curiam* opinion of the Circuit Court of Appeals (composed of Circuit Judges Hutcheson, Holmes and McCord) was rendered December 2, 1946, (R. 191); and is reported in 158 F. (2d) 227.

Jurisdiction

Jurisdiction is invoked under *Section* 240 (a) of the *Judicial Code*, as amended, (Title 28, U. S. Code, Sec. 347 (a)).

The judgment of the Circuit Court was entered on December 2, 1946. (R. 195). Petition for Rehearing was properly filed on December 20, 1946, (R. 196), which was denied without written opinion on January 7, 1947. (R. 204).

Petition for Writ of Certiorari was docketed in this Court on April 7, 1947.

Summary Statement

Complaint was filed by the Administrator, Office of Price Administration, under Section 205 (e) of the Emergency Price Control Act of 1942, as amended, (Pub. Law 421, 77th Cong., 2nd Sess., 56 Stat. 23, 765, 57 Stat. 566, Pub. Law 383, 78th Cong.) against petitioners, seeking treble damages as a pen-

alty for alleged violtaions of Section 4 (a) of said Act, arising from alleged overcharges for two sales and deliveries of dressed poultry in excess of ceiling prices fixed by Second Revised Maximum Price Regulation No. 269, as amended. (R. 1-5).

The essence of the complaint was that petitioners sold and delivered a purported quantity by weight of dressed poultry *at a legal price charged per pound*, but that a lesser quantity was actually delivered and received by the buyer, and by reason of "delivery of short weights" the shipment invoices constituted actual overcharges per pound. (R. 9-11).

Petitioners answered that:

(a) The complaint was insufficient and failed to state a cause of action, because it did not allege the acts charged were willfully, intentionally, or knowingly committed by petitioners (R. 12);

(b) Petitioners were not guilty of any act or conduct in violation of the regulation order or price schedule (R. 13);

(c) If any violation had occurred, it was not willful, nor the result of a failure to take practicable precautions against its occurrence (R. 13).

In open court counsel for the Administrator recognized the necessity of proving the alleged violations occurred by reason of *intentional*, *purposeful*, or *knowing acts* of petitioners, stating: "I think

we are certainly allowed to bring in testimony in this case *to show a system and a conspiracy to short weight.*" (R. 115).

The Administrator proved only that the buyer ordered, petitioners sold, and the buyer bought a specified number of pounds of dressed poultry *at a legal price per pound* (R. 71-72, 55); that petitioners shipped, by a public common carrier, the number of pounds ordered by the purchaser, and invoiced the purchaser for that poundage *at the agreed, legal sale price per pound;* but that upon delivery the buyer weighed the shipments and found them to be of lesser weights than ordered and as invoiced. (R. 76-77, 78, 72).

The Administrator offered no proof whatsoever that prior to this suit petitioners *knew* the weights of the fryers received by the purchaser were less than the weights shipped and invoiced, *nor that petitioners knowingly, purposely or intentionally billed the purchaser for greater weights than were received.*

Admittedly, petitioners were not notified, either by the purchaser or by the Administrator, of the alleged receipt of the lesser weights before the filing of this penalty suit; and that immediately upon learning of the buyer's claim that lesser weights were received, petitioners mailed invoices for those weights *at the agreed, legal price per pound,* refused to accept a check from the buyer for the amount of the original invoices, but subsequently received and accepted payment for the weights claimed to have been received by the purchaser *at the agreed, legal rate per pound.* (R. 84-85, 87, 81-82, 57, 63).

When the Administrator rested his case, petition-

ers moved for an instructed verdict on the ground that the proof failed to show any violation as charged (R. 139). The motion was overruled and exception taken.

Petitioners proved they operate a large concern, having many departments and doing a large monthly business (R. 140-141, 145); that petitioners had no particular knowledge of these orders and shipments except as reflected by their office records (R. 145, 147); that the orders were received, filled and shipped by petitioners in their regular course of business (R. 142-143); and that petitioners' office records and the Express Company's Bill of Lading show shipments of the weights of poultry ordered by the purchaser (R. 156-157, 158); and that, accordingly, invoices for those weights *at the agreed, legal charge per pound* were mailed to the buyer (R. 61, 142); that petitioners first learned of the claim that buyers received *lesser* weights when this suit was filed (R. 150, 147); whereupon petitioners mailed invoices for the weights claimed to have been received by the purchaser *at the agreed, legal charge per pound* (R. 151-152), refused to accept payment in the amount of the original invoices, but subsequently received and accepted payment for the number of pounds claimed to have been received by the purchaser *at the agreed, legal price per pound* (R. 152).

When the case was concluded, petitioners moved for an instructed verdict, but the motion was overruled and exception taken (R. 167).

Prior to submission of the court's charge to the jury, petitioners requested the submission of special

issues for the jury to find whether petitioners charged the purchaser in excess of the legal price per pound for the poultry; whether or not petitioners willfully or knowingly delivered less weights of poultry than invoiced with the intent to charge and collect a price in excess of the maximum legal price per pound; whether or not when petitioners billed the purchaser by the original invoices, petitioners knew a shortage existed in the poultry shipped to and received by the purchaser; and to find what quantity of poultry was knowingly and intentionally delivered by petitioners to the buyer. (R. 13-25). The requested issues were refused by the court and exceptions taken. (R. 13-25).

The court charged the jury that the alleged violations were not by virtue of excessive charges on a per pound basis, but *if any violations were committed, this was by reason of shortage of weight in the deliveries to the purchaser.* (R. 170-171). Only eight special issues were submitted, composed of four inquiries relating to each of the two shipments:

(1) Whether petitioners *delivered* less than the specified weights in the original invoices (R. 172-173, 176);

(2) The number of pounds *delivered* in each shipment (R. 173, 176-177);

(3) Whether the *deliveries* of such lesser weights were not willful (R. 174, 177); and

(4) Whether the *deliveries* of such lesser weights were not the result of petitioners'

failure to take practicable precautions "against the occurrence of the violations," if the jury "found that there was a violation." (R. 175-176, 178).

Petitioners properly objected and excepted to the court's charge to the jury because of the failure to submit the issues requested by petitioners, because the court failed to submit any issue to find whether petitioners knowingly shipped and delivered less weights than those charged in the invoices to the buyer, and because the court failed to submit any issue for the jury to find whether petitioners knowingly charged the buyer for the weights invoiced with knowledge that lesser weights had been shipped and delivered to the buyer (R. 28-32).

The jury's answers to the issues submitted found:

(1) That petitioners *delivered* less weights of poultry than contained in the invoices. (R. 32, 35);

(2) The actual weights *delivered and received by the purchaser.* (R. 33, 36);

(3) *That petitioners did not willfully deliver less weights than invoiced.* (R. 33-34, 36-37); and

(4) That such *deliveries* of lesser weights were not the result of petitioners' failure to take practicable precautions. (R. 34-35, 37-38).

Petitioners moved for judgment upon the answers of the Jury to Special Issues Nos. 3, 4, 7, and 8 *(that the deliveries of lesser weights were not willful, nor the result of a failure to take practicable precautions)*, the grounds being that these answers constituted a finding that no violations had been committed by petitioners as charged (R. 39-42). The motion was overruled, and petitioners excepted (R. 186-187).

The District Court entered judgment for the Administrator, assessing against petitioners a single penalty for the amount of the alleged overcharges (R. 42-49); and an appeal was duly perfected to the United States Circuit Court of Appeals, Fifth Circuit, which affirmed the District Court judgment by *per curiam* opinion rendered December 2, 1947.

Specification of Errors

The Circuit Court of Appeals erred in the following respects:

1.

In affirming the District Court judgment, because the Administrator failed to prove that petitioners violated the OPA Maximum Price Regulation herein by selling, delivering or charging for poultry at a price in excess of the maximum price therefor.

2.

In affirming the District Court judgment herein, because the jury did NOT find that petitioners vio-

lated the OPA Maximum Price Regulation herein by selling, delivering or charging for poultry at a price in excess of the maximum price therefor.

3.

In affirming the District Court judgment herein, because the jury in answer to Special Issues Nos. 3 and 7 found that petitioners did not knowingly deliver less amounts of poultry than invoiced, and thus the jury necessarily found that petitioners did not violate the OPA Maximum Price Regulation herein.

4.

In affirming the District Court judgment herein, because the trial court erred in failing to submit any issue for the jury to find whether petitioners violated the OPA Maximum Price Regulation herein by selling, delivering or charging for poultry at a price in excess of the maximum price therefor.

5.

In affirming the District Court judgment herein, because the trial court erred in failing to submit any issue to the jury to find whether petitioners knowingly shipped less amounts of poultry than invoiced with intent to charge or collect a price in excess of the maximum price therefor.

6.

In holding: "The defense was a denial of a violation *in* that the overcharge, if any occurred, was

not willful or intentional nor was it the result of a failure to take practicable precautions against the occurrence of a violation," because petitioners pleaded: (a) that the complaint failed to state a cause of action, because no willful, intentional or knowing act of petitioners was alleged; (b) that *no violation of any OPA regulation, order or price schedule had been committed by any action or conduct of petitioners;* and (c) that *if* any violation had occurred, it was not willful nor the result of a failure to take practicable precautions against the occurrence of a violation (R. 5-7, 12-13).

7.

In holding there was evidence "that the amount charged for the poultry was in excess of the ceiling price," because the Administrator did not prove that petitioners knowingly shipped or delivered less amounts of poultry than invoiced, nor that petitioners intended to invoice, charge or collect for a greater amount of poultry than was shipped or delivered and thus charge or collect a price in excess of OPA maximum price therefor.

8.

In holding that "the jury returned a verdict on special issues finding: (1) that the *shipments* were short in weight," because the jury found only that there was *delivered to the mess* less amounts of poultry than invoiced (R. 172-173, 176).

9.

In holding that "defendants moving for judgment on this verdict, insisted that since the jury had acquited the defendants both of willfulness and want of care, defendants should have had judgment," because petitioners moved for instructed verdict after the Administrator had rested the case, and moved for instructed verdict after close of the testimony, on the ground that *as a matter of law* no violation had been proved by the Administrator; and petitioners moved for judgment upon the jury's findings to Special Issues Nos. 3 and 7, because the jury found that no violation had been committed in that the jury found that petitioners did *not knowingly* or with wrongful purpose deliver less amounts of poultry than invoiced.

10.

In holding "it is just as much an overcharge to bill a shipment at the correct price per pound with the poundage short as to bill the shipment at a price per pound above ceiling would be," because an unintentional, inadvertent, accidental or mistaken shipment of a lesser poundage than invoiced does not constitute a sale, delivery or overcharge in violation of the OPA Maximum Price Regulation herein.

11.

In holding that the jury's verdict "did not furnish any basis for denying recovery. Indeed, it furnished the basis for the judgment entered. It found

that *the shipment* was short by a number of pounds," because the jury found (a) that the weights of poultry *delivered* to and received by the Mess were less than the invoiced weights; (b) that the *delivery* of such weights was not done knowingly or with wrongful purpose; and, therefore, necessarily found (c) that *petitioners did not knowingly or intentionally invoice for greater weights than delivered;* thus, the jury necessarily found that petitioners did not sell, deliver or charge for poultry at a price in excess of OPA maximum price therefor.

12.

In affirming the District Court judgment herein, because the Court found from the undisputed proof herein that petitioners sold the poultry herein *at the legal price of 45¢ per pound* and invoiced for the poultry *at the legal price of 45¢ per pound* and did not sell, invoice or charge for the poultry by the box, package or individual chicken.

Each of the foregoing Specifications of Error was properly raised and presented in the Circuit Court of Appeals.

ARGUMENT

Summary of the Argument

1. Suits authorized by Section 205 (e) of the Emergency Price Control Act of 1942, as amended, against any person selling a commodity in violation

of any O. P. A. Maximum Price Regulation for recovery of treble the amount of the overcharge, are civil suits, quasi-criminal in nature, for the recovery of penalties; and a strict construction is required of alleged violative acts.

2. The term "selling" in the Act is synonomous with "sale," and has the usual significance of that term, meaning "an *agreement* whereby the seller transfers property and goods to the buyer for a consideration called the price; a contract by which property is transferred from the seller to the buyer *for a fixed price in money*, paid or agreed to be paid by the buyer"; and necessarily connotes *knowing and voluntary* action by the seller.

3. It is NOT a violation of the Emergency Price Control Act or of the O. P. A. Maximum Price Regulation herein for a vendor to sell, ship and invoice a buyer for a quantity of merchandise, *by weight, at an agreed, legal price per pound*, but through *inadvertence, mistake, or accident* there is an *unintentional* delivery of lesser weights to the buyer, *without knowledge or fault of the seller.*

4. In suits by the Administrator of the Office of Price Administration under Section 205 (e) of the Emergency Price Control Act of 1942, as amended, the burden rests upon the Administrator to prove the alleged violation by a preponderance of the evidence.

5. The Administrator failed to prove that petitioners violated the Emergency Price Control Act

and the O. P. A. Maximum Price Regulation herein by selling or delivering poultry at prices in excess of the maximum fixed price, since petitioners admittedly sold, and the buyer bought, the poultry *by weight, at an agreed, legal price per pound,* and there was NO proof that petitioners intended or *knew of* delivery of lesser weights than invoiced.

6. Whether or not petitioners violated the Emergency Price Control Act and the O. P. A. Maximum Price Regulation herein, by selling or delivering poultry at prices in excess of the maximum fixed price, was a fact issued which should have been submitted to the jury, and the timely request of petitioners for the specific submission of such issue should have been granted by the trial court.

7. The jury necessarily found, in answers to Special Issues Nos. 3 and 7, that petitioners did NOT violate the Emergency Price Control Act and the O. P. A. Maximum Price Regulation herein by selling and delivering poultry at prices in excess of the O. P. A. maximum fixed price, since *the jury found that petitioners did not willfully or knowingly deliver less weights of poultry than invoiced.*

First Point

It is not a violation of the Emergency Price Control Act or of the O.P.A. Maximum Price Regulation herein for a vendor to sell, ship and invoice a buyer for a quantity of merchandise, by weight, at an agreed, legal price per pound, but through inad-

vertence, mistake, or accident there is an unintentional delivery of lesser weights to the buyer without knowledge or fault of the seller.

While the United States Supreme Court has not yet specifically decided the question (See No. 431 *Testa vs. Katt*, decided March 10, 1947, 91 L. Ed. 776, 777), it appears that the opinion of the weight of lower court authorities is that suits authorized by *Section* 205 (e) of the *Emergency Price Control Act of 1942*, as amended, against any person selling a commodity in violation of an O. P. A. Maximum Price Regulation for recovery of treble the amount of the overcharge, are civil suits which are quasi-criminal in nature for the punishment of violators through the recovery of penalties, either by the Administrator or by the injured buyer; and a strict construction is required of all alleged violative acts. *Bowles vs. Griffin* (C. C. A. 5), 151 Fed. (2d) 458, 460; *Barnes vs. Bowles*, (C. C. A. 5), 157 Fed. (2d) 790; *Bowles vs. Montgomery Ward & Co.*, (C. C. A. 7), 143 Fed. (2d) 38, 43; *Brown vs. Glick Bros. Lbr. Co.*, (D. C. Cal.), 52 F. Sup. 913; *Bowles vs. Beatrice Creamery Co.*, (D. C. Wyo.), 56 F. Sup. 805; *Bowles vs. Cummins Dist. Corp.*, (D. C. Ky), 56 F. Sup. 941, 942; *Bowles vs. Silverman*, (D. C. S. D.), 57 F. Sup. 990; *Bowles vs. Nasif*, (D. C. La.), 58 F. Sup. 644; *Bowles vs. Trowbridge*, (D. C. Cal.), 60 F. Sup. 48; *Bowles vs. Lenko*, (D. C. Penn.), 64 F. Sup. 592.

The term "selling" in the Act is synonymous with "sale," and has the usual significance of that term, meaning "*an agreement* whereby the seller transfers property and goods to the buyer *for a consideration*

called the price; a contract by which property is transferred from the seller to the buyer *for a fixed price in money, paid or agreed to be paid by the buyer,*" *Link vs. Kallaos,* (D. C. Mo.), 56 F. Sup. 304; *Henderson vs. Glosser,* (D. C. Penn.), 46 F. Sup. 460; and necessarily connotes *knowing* and *voluntary* action by the seller. *Comm. of Internal Revenue vs. Friehofer,* (C. C. A. 3), 102 Fed. (2d) 787, 789, 790, 125 A. L. R. 761.

The term "overcharge" is defined in the Act to mean "the amount by which *the consideration* exceeds the applicable maximum price."

To effect a sale of property there must be *an agreement* between the seller and buyer concerning the terms and conditions of the transfer, usually including the nature and quantity of the property and the fixed amount of the consideration or sale price. To enable and constitute such *agreement* there must necessarily exist a mutual *knowledge* of and acquiesence in the elements and terms of the agreement.

Thus, the language of the Act patently evidences the intention of Congress to penalize a vendor solely for *a voluntary and knowing sale* or transfer of property *for an agreed price which is in excess of the O. P. A. maximum fixed price for the property.*

In an agreement between a seller and buyer for the transfer of a quantity of property *by weight* at an agreed, legal price *per pound,* paid or to be paid by the buyer, the consideration or sale price is *the agreed price per pound.* If a lesser weight than agreed is delivered to the buyer, *the consideration or sale price per pound remains unchanged,* as would be true if there was delivery of a greater weight than agreed. The fact that the seller bills or invoices

the buyer for the total agreed quantity, *by weight*, at the agreed price per pound, but the buyer is delivered a lesser weight, does not void or vary the terms of the agreed sale, nor create a sale of the lesser weight for the total of the agreed price of the greater weight. *The consideration remains the agreed, fixed price per pound.*

A fortiori when a vendor sells a buyer a quantity of merchandise *by weight* at an agreed, legal price per pound, invoicing the buyer for the total agreed weight at the agreed, legal price per pound, but through *inadvertence, mistake or accident* there is an *unintentional* delivery to the buyer of a lesser weight than invoiced, the terms and consideration of the original sale are not voided, nor is a new sale effected of the lesser weight at the consideration of the total of the agreed price of the greater weight.

The opinion of the Circuit Court of Appeals herein concludes that "It is just as much an overcharge to bill a shipment at the correct price per pound with the poundage short as to bill the shipment at a price per pound above ceiling would be." (R. 194); but by the terms of Section 205 (e) of the Act, an *overcharge* is the amount by which *the consideration of the sale* exceeds the applicable maximum price. Accordingly, there can be no *overcharge* unless there exis'ts *a sale*, for an agreed consideration exceeding the maximum fixed price. An inadvertent, accidental or unintentional shortage in a shipment pursuant to a sale of an agreed quantity of merchandise *by weight* at an agreed, lawful price *per pound* for which the buyer is billed by invoice, does not constitute a sale of the short weight at the total of the consideration for the greater weight, in

the absence of admission or proof that the seller and buyer had made such *agreement*, expressly or impliedly.

To paraphrase the ruling of the Circuit Court of Appeals, we concede that it may be "just as much an overcharge to bill a shipment at a correct price per pound with the poundage *intentionally or knowingly* short as it would be to bill the shipment at a price per pound above the ceiling price." In such instances, however, *the true sale would be of the lesser weight at the total price for the greater weight;* and the billing for the greater weight would be merely the subterfuge by which the true sale is sought to be camouflaged.

But an unintentional, mistaken, inadvertent or accidental delivery of a lesser quantity of merchandise than billed does not constitute a sale of the lesser quantity at the charge for the greater quantity; and mere proof of the shortage, without proof of the shipper's *knowledge* of the shortage, does not prove the sale, nor it is even *prima facie* proof of the sale.

The authorities cited in the opinion of the Circuit Court of Appeals in support of its opinion herein are not in point. In each of those cases the violation by sales at prices in excess of O. P. A. maximum fixed prices was admitted or proved beyond question, but good faith or lack of intent to violate were urged as *complete defenses.*

In Bowles vs. Hastings, (C. C. A. 5), 146 Fed. (2d) 94, the trial court found *sales were made at excess prices* but that the *violation* was not wilful, and refused to imposed a penalty. The Circuit Court held that *when an excess price is charged* the damage

is done and the Court has no discretion to withhold the imposition of the penalty, but if the defendant then proves *the violation* was neither wilful nor the result of failure to take practicable precautions against its occurrence, the penalty is reduced to the amount of the overcharge.

In *Bowles vs. Indianapolis Glove Co.*, (C. C. A. 7), 150 Fed. (2d) 597, violations were shown by sales *admittedly made at prices above the O. P. A. maximum price*, but in the belief that such sales conformed with the price regulations. The Circuit Court held that *since the violations were proved*, the good faith of the defendant was not a complete defense, but was to be considered only in reduction of the penalty.

In *Shearer vs. Porter*, (C. C. A. 8), 155 Fed. (2d) 77, the evidence showed conclusively that violations had occurred through *sales made at prices above O. P. A. ceiling prices*, and treble damages were assessed as mandatory. The Circuit Court held that *when a violation is shown*, the only question is the amount of penalty to be assessed, which defendant is entitled to have limited to the amount of overcharge if defendant proves *the violation* was not wilful nor the result of failure to take practicable precautions against its occurrence.

In *Kenney vs. Hood*, (C. C. A. 5), 158 Fed. (2d) 226, the defendant sold a refrigerator *at a price exceeding the O. P. A. fixed price* in the belief there was no ceiling price, and a single penalty assessed for the *admitted violation* upon a jury finding that the violation was neither wilful nor the result of failure to take practicable precautions. The Circuit Court held that the defenses of mutual mistake con-

cerning the existence of a ceiling price and the purchaser's fraud in failing to advise the seller of a ceiling price were not available because of the seller's failure to bring timely action to rescind the agreement.

In *Brown vs. Mars, Inc.*, (C. C. A. 8), 135 Fed. (2d) 843, Mars was charged with violation of the O. P. A. established price through the device of decreasing weights without reductions in the price charged for candy bars. The defense was that the candy was not sold by weight but by the bar, and that weight changes were occasioned by changes of formula and ingredients used without decrease in quality of the bar. The trial court found the weights of candy bars, sold packaged in boxes and cartons, were reduced without reduction in the fixed price of the bars, but refused to enjoin. The Circuit Court held that any decrease in weight of foods *sold by the piece or by the package* without a corresponding decrease in price has the same effect on the purchaser and on the seller as an increase in price, since less is sold for the same money. However, the Court further held that *any such decreases caused by innocent changes in formula or by innocent methods in manufacture, or both, are not violations of the Act*, defining "innocent" as meaning those decreases which do not result in circumvention or evasion of the maximum price.

The Mars case does not support the conclusions reached by the Circuit Court of Appeals herein; to the contrary, it supports our point that it is NOT a violation of the Emergency Price Control Act or of an O. P. A. Maximum Price Regulation for a vendor to sell, ship and invoice a buyer for a quan-

tity of merchandise, by weight, at an agreed, legal price *per pound*, if through *inadvertence, mistake or accident* there is an *unintentional* delivery of lesser weights to the buyer without knowledge or fault of the seller.

Second Point

The Administrator failed to prove that petitioners violated the Emergency Price Control Act and the O.P.A. Maximum Price Regulation herein by selling or delivering poultry at prices in excess of the maximum fixed price, since petitioners admittedly sold, and the buyer bought, the poultry by weight, at an agreed, legal price per pound, and there was no proof that petitioners intended or knew of delivery of lesser weights than invoiced.

The complaint was that petitioners purportedly sold and delivered a specified quantity *by weight* of dressed poultry *at a legal price per pound*, but that a lesser quantity was actually sold, delivered to and received by the buyer, and "by reason of delivery of short weights" the shipment invoices constituted actual overcharges per pound in violation of the O. P. A. regulation. (R. 9-11).

The Petitioners answered that they were not guilty of any act or conduct in violation of the O. P. A. regulation, order, or price schedule (R. 13); but that *if* any violation had occurred, it was not wilful nor the result of failure to take practicable precautions against its occurrence. (R. 13).

Trial was before a jury. (R. 54).

The Administrator recognized the necessity of proving the alleged violations occurred by reason of

intentional, purposeful or knowing acts of petitioners, his counsel stating: "I think we are certainly allowed to bring in testimony in this case *to show a system and a conspiracy to short weight.*" (R. 115).

It was stipulated that the ceiling price for the poultry was 46.68 cents per pound (R. 56).

The Administrator proved only that the buyer ordered and bought and petitioners sold a specified number of pounds of dressed poultry *by weight, at the agreed, legal price of 45¢ per pound* (R. 71-72); that petitioners shipped, by a public common carrier, the number of pounds ordered by the purchaser, invoicing the purchaser for that poundage *at the agreed, legal price per pound* (R. 56, 72), but that upon delivery the buyer weighed the shipments and found them to be of lesser weights than ordered and invoiced. (R. 76-78).

The Administrator offered no proof whatsoever that prior to the suit petitioners *knew* the weights of poultry received by the purchaser were less than the weights shipped and invoiced, nor that petitioners *knowingly, purposely or intentionally* billed the purchaser for greater weights than were delivered to and received by the purchaser.

Admittedly, petitioners were not notified, either by the purchaser or by the Administrator, of the alleged receipt of the lesser weights before the filing of this suit; and that immediately upon learning of the buyer's claim that lesser weights were received than were ordered and invoiced, petitioners mailed corrected invoices for such weights *at the agreed legal price of 45¢ per pound*, refused to accept a check for the amount of the original invoices, but subse-

quently received and accepted payment for the weights claimed to have been received by the purchaser *at the agreed, legal rate of 45¢ per pound.* (R. 84-85, 56-57, 61-63, 142, 147, 151-152).

When the Administrator rested his case, petitioners moved for an instructed verdict on the ground that *no violation had been proved as charged.* The motion was overruled, and petitioners excepted. (R. 139.)

Petitioners proved they operate a large concern with many departments and do a large monthly volume of business (R. 141, 145); that petitioners had no particular knowledge of these orders and shipment, except as reflected by their office records (R. 145, 147); that these orders were received, filled and shipped in the regular course of business (R. 142-145, 158); that *petitioners' records and the Express Company Bills of Lading showed shipments of the weights of poultry ordered by the purchaser* (R. 152, 158, 55-56, 59-60); that *invoices for those weights at the agreed, legal charge of 45¢ per pound were mailed to the buyer* (R. 61); that petitioners first learned that the buyer claimed to have received lesser weights upon delivery when suit was filed (R. 147, 150); that petitioners promptly mailed invoices for the lesser weights claimed to have been received by the purchaser, *at the agreed, legal charge of 45¢ per pound* (R. 151), *refused to accept payment in the total amount of the original invoices* (R. 152), but subsequently collected and accepted payment for the number of pounds claimed to have been received by the purchaser, *at the agreed, legal price of 45¢ per pound.* (R. 152, 56-57, 63).

When the case was concluded, petitioners moved for an instructed verdict; the motion was overruled, and petitioners excepted. (R. 167).

There was no proof that petitioners and the buyer made a sale agreement for the poultry at a price exceeding the O. P. A. ceiling price, it being uncontroverted that *the sale was of a designated quantity of poultry by weight, at an agreed, legal price of 45¢ per pound.* Nor was there proof that the amount charged for the poultry sold was in excess of the ceiling price. Admittedly, the buyer ordered and bought 800 pounds and 300 pounds, respectively, of poultry at a *legal price of 45¢ per pound,* which was below the ceiling price, and that petitioners agreed and sought to fill and deliver those orders *at such price per pound.* The buyer did not agree to buy and petitioners did not agree to sell the poultry on any basis other than *the agreed legal price of 45¢ per pound;* and the poultry was not sold or bought by the number of chickens or by the quantity of boxes of chickens, but were bought and sold solely *by weight* at the agreed, legal price of 45¢ per pound.

Neither the buyer nor seller are shown by the proof to have had a sale agreement for the lesser weights received by the buyer, in consideration of the payment or agreement to pay for the greater weights charged in the invoice. The sole sale proved was of the quantity *by weight* of poultry invoiced *for the agreed consideration or sale price of 45¢ per pound.*

It was the *theory* and *suspicion* of the Administrator that the sale and purchase was of the lesser weights but for a consideration and price in excess

of the maximum fixed price of 46.68¢ per pound, and that such illegal sale was sought to be camouflaged by the suberfuge of invoices for greater weights at a legal rate per pound.

In the absence of proof by the administrator that petitioners even *knew* of the delivery of the lesser weights, there is no proof of any intention or purpose of petitioners to sell or deliver the lesser weight, much less to charge for the greater weights shown in the invoices. There being no proof of the sale of the lesser weights received by the purchaser for the total consideraiton or sale price charged in the invoices for the larger weights, nor that petitioners *knowingly* shipped or delivered less poultry than invoiced, nor *knowingly* invoiced the buyer for a greater amount of poultry than was delivered, the Administrator wholly failed to prove that petitioners committed a violation of the O. P. A. Maximum Price Regulation herein, or of the Emergency Price Control Act.

It is well settled that the Administrator has the burden of proof in actions to recover penalties for violations of the Price Control Act by over-ceiling sales. *Barnes vs. Bowles* (C.C.A. 5), 157 Fed. (2d) 790; *Henderson vs. Beaird* (D. C. La.), 48 F. Sup. 252; *Bowles vs. Cohn* (D.C. N.Y.), 57 F. Sup. 306; *Bowles vs. Hansen Packing Co.* (D.C. Mont.), 64 F. Sup. 131.

The Courts universally recognize that in injunction and penalty suits, as well as criminal prosecutions, *knowledge* of the commission of *acts* which constitute a violation of price regulations and the

Price Control Act is an essential element to be proved by the complainant.

In *Bowles vs. Arlington* (C.C.A. 7), 148 Fed. (2d) 467, dealers, through auctioneers, sold used machinery as rebuilt and guaranteed. The complaint charged the machinery actually sold was in "as is" condition, thus sold at excessive prices. The Circuit Court held the evidence insufficient to show the auctioneers had *knowledge* the machines were not rebuilt and guaranteed when sold as such, and thus insufficient to prove a violation by the auctioneers.

In *Bowles vs. Assad* (D.C. Penn.), 56 F. Sup. 8, a broker handling a shipment of scrap steel in good faith and without *knowledge* of the content, was held not to have violated the price regulation.

In *Brown vs. Bananna Distrib. of America* (D.C. Conn.), 52 F. Sup. 804, the complaint charged violation of O. P. A. ceiling prices by a tying-in agreement assertedly used as a means of evasion, and it was held that to show a violation it must be made to appear that *the practice was so used.*

In *Bowles vs. Cunningham* (D.C. Penn.), 61 F. Sup. 162, it was held that as the defendant had no *knowledge* of the payment of transportation costs exceeding the price regulation, he was not properly chargeable with violation of the price regulation, and no injunction would issue.

Henderson vs. Glosser (D.C. Penn), 46 F. Sup. 460, is identical in principle with the present case. The defendant was charged with violating the price regulation by purchasing scrapiron at prices exceeding the maximum, fixed price. Defendant admittedly sold a scrapiron company two presses at a specified

price to be paid for in No. 1 scrapiron at a regular base price of $20.00 per ton. Two carloads of low-grade scrapiron, invoiced as No. 1 scrapiron, were received and used by the defendant. Upon discovery of the lower grade of scrap it was utilized by the defendant, but the shipper was notified of the defective quality, and that credit would be given only for the price of the lower grade metal. It was held that the proof was insufficient to establish a violation by defendant of the price regulation, proof of the acceptance and use of the steel being insufficient to show a purchase in violation of the price regulation in absence of payment of, or an agreement to pay, the higher price.

In *U. S. vs. Steiner*, (C.C.A. 7), 152 Fed. (2d) 484, 487, the complaint charged violation of O. P. A. ceiling prices by tractor sales, and the defense was that a *bona fide* lease transaction occurred. The Court held a question of fact was presented to determine whether a good faith lease existed or whether there was a *knowing, intentional and wilful device to evade* the statute and price regulation.

In *Zimburg vs. United States*, (C.C.A. 1), 142 Fed. (2d) 132, defendant had issued invoices showing delivery of 184 pounds and 764 pounds of beef at a legal price per pound, but it was alleged that defendant in fact made a sale of lesser weights at excessive prices. The purchaser testified that prior to the transaction defendant advised him he would be required to pay 30¢ per pound, an amount in excess of the ceiling price, *regardless of weights shown by the invoices*, and that the weights actually delivered were such that the purchase and sale was actually at

30¢ per pound. The Court held that as there was evidence that defendant *knowingly* used a scheme, method and practice to evade the price regulation, the evidence was sufficient to sustain conviction.

In *Porter vs. Hoffman*, (D.C. Cal.), 65 F. Sup. 492, the complaint charged sales of meat at prices exceeding O. P. A. maximum prices. It was held that since the most the testimony for the Administrator accomplished was to cast suspicion on the methods of defendant, and was speculative as concerned the alleged *violation*, the defendant was entitled to judgment.

In *Brown vs. Schagrin*, (D.C. Del.), 64 F. Sup. 345, the action was to recover a penalty of treble damages for alleged violation of an O. P. A. maximum price regulation. It was held that defendant's explanation of facts concerning the alleged violation must be taken as true since the O. P. A. investigators failed to check and prove the inaccuracies of such explanation.

See also *Greely vs. Thompson*, 51 U. S. 225, 10 How. 225, 13 L. Ed. 397, holding that when doubt exists as to whether a penalty should be imposed, the person upon whom it would be imposed should be favored.

Third Point

Whether or not petitioners violated the Emergency Price Control Act and the O.P.A. Maximum Price Regulation herein, by selling or delivering poultry at prices in excess of the maximum fixed price, was a fact issue which should have been sub-

mitted to the jury, and the timely request of petitioners for the specific submission of such issue should have been granted by the trial court.

Before submission of the Court's charge to the jury, petitioners presented to the Court and requested the submission of special issues for the jury to find whether or not petitioners charged the purchaser in excess of the legal price per pound for the poultry, whether or not petitioners wilfully or knowingly delivered less weights than invoiced with the purpose or intent to charge or collect a price which was in excess of the maximum legal price, whether or not petitioners knew a shortage existed in the poultry delivered and received by the purchaser when petitioners billed the purchaser by the original invoices, and to find what quantity of poultry was knowingly and intentionally delivered by petitioners to the buyer. The requested issues were refused by the Court and exceptions taken. (R. 13-25).

The Court charged the jury that the complaint of the Administrator alleged petitioners violated the Emergency Price Control Act and the O. P. A. Maximum Price Regulation herein by *an actual sale and delivery of shortweights and a charge for greater weights at a legal price per pound,* thus resulting in an overcharge for the actual sale of shortweights (R. 169-170); that the alleged violations were not by reason of petitioners charging in excess of the ceiling price per pound, but that *if any violations were in fact committed it was by reason of the sale of shortweights.* (R. 170-171). Only eight Special Issues

were submitted, composed of four inquiries relating to each of the two shipments:

1. Whether petitioners *delivered* less than the specified weights in the original invoices (R. 172-173, 176);
2. The number of pounds actually *delivered* in each shipment (R. 173, 176-177);
3. Whether the *deliveries* of lesser weights than invoiced were not wilful (R. 174, 177); and
4. Whether the *deliveries* of lesser weights than invoiced were not the result of petitioners' failure to take practicable precautions against the occurrence of the violation (R. 175-176, 178).

Petitioners timely and properly objected and excepted to the Court's charge because of the failure to submit the issues requested by petitioners, because the Court failed to submit any issue for the jury to find whether petitioners *knowingly* shipped and delivered less weights than invoiced to the buyer, and because the Court failed to submit any issue for the jury to find whether petitioners *knowingly* charged the buyer for the weights invoiced with *knowledge* that lesser weights had been shipped and delivered to the buyer. (R. 28-32).

As has been previously argued, at no stage of the trial was any proof presented by the Administrator to show sales by petitioners at prices in excess of the O. P. A. ceiling prices in violation of the Price Control Act, and therefore petitioners' respective motions for instructed verdict, when the Administrator

rested his case and when the whole case had closed, should have been sustained.

However, in view of the action of the trial court in overruling the motions for instructed verdict, petitioners timely and properly requested the submission of special issues to obtain a specific finding of the jury whether or not petitioners had made *sales* of poultry at prices in excess of O. P. A. ceiling prices and thus had made an illegal overcharge to the buyer in violation of the Emergency Price Control Act. That question was the crux of the Administrator's complaint and the heart of the case. It was a fact question to be determined by the jury. *Bowles vs. Goebel*, (C.C.A. 8), 151 Fed. (2d) 671, 675; *Flanagan vs. United States*, (C.C.A. 9), 154 Fed. (2d) 740; *United States vs. Lutz*, (C.C.A. 3), 142 Fed. (2d) 985; *Brown vs. Quinlan*, (C.C.A. 7), 138 Fed. (2d) 228; *Shearer vs. Porter*, (C.C.A. 8), 155 Fed. (2d) 77.

Subordinate fact issues required to be submitted to the jury for findings, *only if and after a violation was found*, were the affirmative defensive issues (1) whether the violation was not wilful, and (2) whether the violation was not the result of a failure to take practicable precautions against its occurrence. *Shearer vs. Porter*, (C.C.A. 8), 155 Fed. (2d) 77; *Bowles vs. Goebel*, (C.C.A. 8), 151 Fed. 671, 675; *Bowles vs. Hansen Packing Co.*, (D.C. Mont.), 64 F. Sup. 131, 134.

Moreover, petitioners timely and properly objected and excepted to the Court's charge because of its failure to include any issue for the jury to find specifically whether petitioners had made sales of poultry

as charged at prices exceeding the O. P. A. ceiling prices in violation of the regulation and the Price Control Act.

The jury was asked by the Court only to find whether the buyer was *delivered* less weights of poultry than invoiced by petitioners, and the actual weights of the poultry *delivered* to and *received* by the purchaser. These issues were inadequate to present the question whether a sale was made by petitioners to the buyer of the lesser, delivered weights for the consideration or price of the total amount of invoice charges.

Conceivably, *innocent* delivery of lesser weights than invoiced may have occurred in numerous ways:

1. Through inadvertent mistake of a clerk, a shipment destined for one buyer may have been shipped to another;
2. Through error of the common carrier, shipment to one buyer inadvertently may have been delivered to another;
3. Through pilferage or mishap, a portion of the shipment to the buyer may have been lost, after delivery of the correct weights to the common carrier by the seller and while the shipment remained in the custody of the common carrier;
4. Through pilferage or other mishap, a portion of the contents of the shipment may have vanished after delivery to the buyer and before the delivered shipment had been weighed.

An *inadvertent, mistaken, unknowing or uninten-*

tional delivery of lesser weights than invoiced would not constitute a *sale* of the lesser weights at the total invoice charge for the greater weights. Mere proof of the *delivery* of lesser weights than invoiced would not constitute even *prima facie* proof of a sale of the lesser weights for the consideration or price of the total invoice charge, *in absence of proof that delivery of the lesser weights and invoices for the greater weights was knowingly, voluntarily or purposely made by the seller.*

The trial court clearly committed error in failing to submit specifically the issues requested by petitioners; and the Circuit Court of Appeals erred in overruling the assignments of error upon this point properly raised by petitioners, and in affirming the trial court judgment.

Fourth Point

The jury necessarily found, in answers to Special Issues Nos. 3 and 7, that petitioners did NOT violate the Emergency Price Control Act and the O.P.A. Maximum Price Regulation herein by selling and delivering poultry at prices in excess of the O.P.O. maximum fixed price, since the jury found that petitioners did not wilfully or knowingly deliver less weights of poultry than invoiced.

As previously recited, the requested special issues of petitioners for the jury to find specifically whether petitioners violated the O. P. A. Regulation and the Price Control Act by selling shortweights at the invoice charge for greater weights were refused by

the trial court (R. 13-25); and petitioners properly objected and excepted to the charge of the Court because of the failure to submit special issues for the jury to find specifically whether petitioners had overcharged the buyer in violation of the Maximum Price Regulation and Price Control Act by selling short-weights for the total consideration or price invoiced for the greater weights. (R. 28-32).

The only issues submitted to the jury were:

(1) Whether petitioners *delivered* less weights than invoiced;

(2) The specific number of pounds *delivered* to the purchaser;

(3) Whether the *deliveries* of such lesser weights were not wilful; and

(4) Whether the *deliveries* of such lesser weights were not the result of a failure to take practicable precautions. (R. 172-178).

The jury found in answers to these issues:

(1) That petitioners *delivered* less weights than invoiced (R. 32, 35);

(2) The actual weights *delivered and received* by the purchaser (R. 33, 36);

(3) That the *deliveries* of lesser weights than invoiced were not wilful (R. 33-34; 36-37); and

(4) That the *deliveries* of lesser weights than invoiced were not the result of failure to take practicable precautions. (R. 34-35, 37-38).

Petitioners moved for judgment upon the answers of the jury to Special Issues 3, 4, 7 and 8 (that the deliveries of lesser weights than invoiced were not wilful nor the result of failure to take practicable precautions), the ground urged being that such answers necessarily constituted *a finding that no violation had been committed by petitioners as charged.* (R. 39-42). The motion was overruled and exception taken (R. 186-187).

Assuming that the mere *delivery* of lesser weights than invoiced constituted a *sale* of the lesser weights at a price of the total of the invoice charge for the greater weights, the trial court entered judgment for the Administrator, assessing against petitioners a single penalty for the amount of the purported overcharge. (R. 42, 49).

The only apparent basis for the refusal of the trial court to submit *specifically* appropriate special issues for the jury to find whether petitioners violated the Regulation and Act by selling short-weights for the consideration or price charged in the invoices for greater weights is that the Court clumsily submitted the question in Special Issues Nos. 3 and 7, for findings whether petitioners wilfully or knowingly *delivered* lesser weights than invoiced, as the Court charged in connection with such issues that the term "wilful" implies "*a knowledge and purpose to do wrong.*" The findings of the jury to these issues therefore necessarily amount to a finding that *petitioners did not knowingly or with wrongful purpose deliver the lesser weights.* As petitioners did NOT knowingly or with wrongful purpose deliver lesser weights than

invoiced, petitioners could not conceivably have *sold* the lesser weights for the price as invoiced for the greater weights; if petitioners did not knowingly or with wrongful purpose deliver lesser weights than invoiced, petitioners could not knowingly or with wrongful purpose have *invoiced* for the greater weights.

For petitioners to have *sold* the lesser weights for the total consideration of the invoice charge for the greater weights, petitioners must necessarily have *knowingly and purposely* delivered the lesser weights, and *knowingly and purposely* invoiced for greater weights.

The findings that petitioners did NOT knowingly or with wrongful purpose *deliver* lesser weights than invoiced are diametrically antagnostic to the existence of a sale of the lesser delivered weights for the total consideration or invoice charge for the greater weights. Particularly is this true when the undisputed proof is that the sales herein were of poultry, *by weight, at an agreed, legal price per pound;* the invoices were for poultry, *by weight, at the agreed legal price per pound;* and petitioners received and accepted payment only for the weights actually delivered, *at the agreed, legal price per pound.*

As the jury found that petitioners did not knowingly or voluntarily deliver lesser weights than invoiced, and that the deliveries of lesser weights than invoiced were not the result of a failure to take practicable precautions, and these findings are diametrically opposed to the existence of a sale and overcharge in violation of the Regulation and Act, the trial court clearly erred in rendering judgment

penalizing petitioners; and the Circuit Court of Appeals erroneously denied the assignment of error upon this point in affirming the judgment of the trial court.

Conclusion

The rulings and errors of the Circuit Court of Appeals in this case are patently and grossly unjust to petitioners, who have been adjudged guilty of violating the O. P. A. Maximum Price Regulation and the Emergency Price Control Act by charging excess prices for poultry despite the *uncontradicted* evidence that petitioners sold and the purchaser bought the poultry *by weight at a legal price per pound,* that petitioners invoiced the buyer for the poultry *at a legal price per pound,* that the petitioners shipped to the buyer, by common carrier, the weights of poultry for which invoices were sent the buyer, and that *the deliveries* to the buyer of lesser weights than invoiced *were without the knowledge of petitioners;* and the jury found petitioners *neither willfully nor carelessly delivered lesser weights than invoiced.*

Petitioners respectfully, but earnestly, urge that the District Court and the Circuit Court of Appeals, respectively, erred in the respects set forth in the Specification of Errors herein.

Petitioners pray that a Writ of Certiorari issue to the end that the judgments of the Circuit Court of Appeals and of the District Court herein be reviewed, reversed and judgment rendered for petitioners; alternatively, that the judgments of the Cir-

cuit Court of Appeals and the District Court be reversed and this cause remanded for a new trial; and for such other orders and relief to which petitioners may be justly entitled.

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Copies of this brief have been served upon respondent by mailing such copies to the Solicitor General of the United States, Washington, D. C.